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No. 20

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

WMCA, INC., R. PETER STRAUS, JOSEPH DE MAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

*Appellants,*

*against*

CAROLINE K. SIMON, Secretary of State of the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; PAUL R. SCREVANE, President of the City Council of the City of New York; EUGENE H. NICKERSON, County Executive, Nassau County; LEONARD BERMAN, Chairman, Board of Supervisors, Westchester County; ARTHUR CROMARTY, Chairman, Board of Supervisors, Suffolk County; DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections, New York City,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF OF PAUL R. SCREVANE, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS AND THOMAS MALLEE, APPELLEES

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

No. 460

WMCA, INC., *et al.*,

*Appellants,*

–v–

CAROLINE K. SIMON, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF OF PAUL R. SCREVANE, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS AND THOMAS MALLEE, APPELLEES

This brief is submitted by appellee Paul R. Screvane, as President of the City Council of the City of New York, and appellees Denis J. Mahon, James Power, John R. Crews and Thomas Mallee, as Commissioners of the Board of Elections of the City of New York, in support of appellants' jurisdictional statement filed September 25, 1962 (the "Jurisdictional Statement"). The position of these appellees is that of the City of New York and for convenience they will be collectively called the City of New York or the City.

The City of New York answered, admitting the allegations of the complaint (R. 41-42), and in the prior appeal to this Court submitted a brief in support of appellants' jurisdictional statement. See Brief of Abe Stark, et al., *WMCA* v. *Simon*, October Term, 1961, No. 836. At the hearing held by the court below on August 1, 1962, following this Court's vacatur of the prior judgment of dismissal (370 U. S. 190), the City supported appellants' claims and offered Hon. Abraham D. Beame, Comptroller of the City of New York, as a witness to prove the allegation of the complaint that the legislature of the State of New York for a number of years has unjustly discriminated against large segments of the population of the state in the allocation of the burdens of taxation and in the unequal and unjust distribution of funds derived by the state through the exercise of its taxing powers (complaint, par. 18; R. 12).*

The City will not repeat the introductory portions of the Jurisdictional Statement (pp. 2-8). It endorses the matters therein set forth as a complete and accurate summary of the jurisdictional facts, the questions presented and the proceedings and opinions below. It also supports the arguments of appellants that the questions presented are substantial.** The purpose of the City's brief is to supple-

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* The opinion of District Judge Levet misinterprets as a concession a statement made by counsel for the City at the hearing (opinion below, p. 4). The statement quoted by Judge Levet related only to the City's offer of proof through Comptroller Beame, as the context of the statement plainly shows (R. 345-346, 371-374). The City's offer of proof was rejected by the court below (R. 374). See Jurisdictional Statement at pp. 21-22.

** The City's position, however, is that the only valid method of apportionment under the Equal Protection Clause is for both houses of the legislature to be proportionate to population. Only if this Court were to reject this position would the City support the position that one house need not be proportionate to population provided there is not too great a disparity from population. See Jurisdictional Statement at pp. 10-11.

ment the discussion in the Jurisdictional Statement as to why the questions presented are so substantial as to require plenary consideration by this Court.

## The Questions Presented Are Substantial

Fairly comprised within the questions presented in the Jurisdictional Statement are the following subsidiary questions:

(1) When the method of legislative apportionment in a state results in a substantial impairment of the voting power of the majority of the state's population in *both* houses of a two-house legislature, can such a method of apportionment be justified under the Equal Protection Clause *on any ground whatsoever?*

The City contends that it cannot; proof of substantial impairment of the voting power of the majority in both houses of the legislature establishes a *per se* violation of the Equal Protection Clause.

(2) Assuming, *arguendo*, that a ground for justification may exist under the circumstances of a particular legislative apportionment, does the burden of proof of such justification rest on the party attempting to sustain the constitutionality of the apportionment, or must plaintiff prove *absence of justification* in addition to the existence of a substantial impairment of the majority's voting power in both houses of the legislature?

The City contends that at least a *prima facie* case of unconstitutionality is established by proof of a substantial impairment of the majority's voting power in both houses of the legislature, and that where, as in this case, no proof

to justify the impairment was offered, appellants' claim must be sustained.

(3) Assuming, *arguendo*, that whether a state's method of legislative apportionment is a violation of the Equal Protection Clause depends on the extent to which it is an irrational "crazy quilt," is New York's method of apportionment invalid under such a test?

The City contends that New York's method of legislative apportionment is invalid, even under a "crazy quilt" test.

## The Method of Legislative Apportionment of Both the Senate and the Assembly has Resulted in a Substantial Impairment of the Voting Power of the Majority

The legislative power of the State of New York is vested in a two-house legislature, composed of the Senate and the Assembly. N. Y. CONST., Art. III, §1. Legislative apportionment is effected by statute, in accordance with the method of apportionment prescribed by the state constitution. See *Id.* §§2-5. The county is the basic unit of area for apportionment purposes,* except that two sparsely populated counties, Fulton and Hamilton,** are treated as one. *Id.* §5.

A legislative apportionment was effected in New York State in 1953, based on the 1950 federal census figures. See N. Y. LAWS 1953, c. 893. Subject to the outcome of this ap-

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* No county may be divided in forming a senate district, except to make two or more districts wholly within the county. N. Y. CONST., Art. III §4, par. i. Assemblymen are apportioned by counties. *Id.* §5.

** Hamilton County is one of the largest counties in the state. (See Appendix C to opinion below, p. 35a)

peal, a new legislative apportionment must be effected before 1966, upon the basis of the 1960 federal census figures. In the ten-year period from 1950 to 1960 the population of New York State* has increased from 14,203,449 to 16,240,786.

The number of assemblymen is fixed at 150. N. Y. CONST., Art. III, §2. The number of senators is fixed at not less than 50 and may vary with each apportionment. *Id.* §§2, 4, par. 3. In the 1953 apportionment it was 58; in the pending apportionment based on the 1960 census, it will be 57.

As a result of the 1953 legislative apportionment a minority of 37.5% of the population of the state elected a majority of the members of the Assembly and a minority of 40.9% of the population of the state elected a majority of the members of the Senate. After the legislature is reapportioned based on the 1960 census, these figures will become 37.0% for the Assembly and 38.1% for the Senate, respectively.**

The City of New York, by far the largest population center in the state, had 53.2% of the population of the state in 1950 yet was apportioned only 43.3% of the assembly-

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* New York uses *citizen* population as the measure for apportionment purposes, see N. Y. CONST., Art. III, §§4, 5, and in this brief "population" means citizen population.

** These percentages are determined by arithmetic, using the total population of the 76 least populous assembly districts and the 30 (in the 1953 apportionment) and 29 least populous senate districts, respectively. The sources of the figures for the 1953 apportionment are N. Y. LEGIS. MAN. 1961-62 at 722-45 (senate districts) and *Report of the Joint Legislative Committee on Reapportionment*, N. Y. LEGIS. Doc. (1953) No. 98, Ex. E (assembly districts). The figures for an apportionment based on the 1960 census are found in Appendix A (senate districts partial) and Appendix B (assembly districts) to the opinion below, pp. 31a, 33a.

men and 43.1% of the senators in the 1953 apportionment. The 1960 federal census shows that New York City now has 45.8% of the state's population. The proposed new apportionment will give it only 37.3% of the Assembly seats and 36.8% of the seats in the Senate. Thus, the effect of both the present and proposed apportionments is to reduce the representation to which New York City is entitled on the basis of its population by about 19% in the Assembly and the Senate.*

Under the present apportionment of the Assembly, the most populous assembly district has a population of 167,226 (one district in Onondaga County); the least populous is the district comprising Schuyler County, with a population of 14,066. The average population per district in the Assembly is 94,689. The 26 least populous one-assemblyman counties each has a population of less than 55,000.

In the pending apportionment of the Assembly, Schuyler County will continue as the least populous district with 14,974, the most populous will be one district in Suffolk County with 216,704, and the average population per district will be 108,272. Despite the population-per-district increase of almost 14,000 in the ten years from 1950 to 1960, the 26 least populous one-assemblyman counties all

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* A 1950 study conducted under the auspices of the New York State Joint Legislative Committee on Reapportionment concluded that: "The cities, particularly the City of New York, do not have equitable representation in either House" and that the present method of obtaining the ratio for apportioning senators is "unfair to urban districts." See *Preliminary Report to the Joint Legislative Committee on Reapportionment*, N. Y. Legis. Doc. (1950) No. 31, at 44 and 12. The study also describes as an "inequity" the 1943 apportionment of the Senate, under which New York City with 53.5% of the state's population received only 44.6% of the senate seats. *Id.* at 53, 55, fn. 84.

show a population of less than 57,000 each in the 1960 census.

For the Senate, the range in the present apportionment is from the 39th District (Essex, Saratoga and Warren Counties) with a population of 146,666, to Bronx County's four districts, each averaging 344,545, as compared to the state-wide average of 244,887 per district.

In the apportionment based on the 1960 census, Nassau County will have three districts, each with a population averaging 425,267, as compared with the probable least populous district—again the Essex, Saratoga and Warren County district—with a population of 166,715.* The state-wide average will be 284,926 per senate district.

As the above figures show, the present apportionment has resulted, and the pending apportionment based on the 1960 census will result, in a substantial impairment of the votes of the majority in *both* the Assembly and the Senate. This impairment has been effected by means of discriminatory geographic classification resulting from the method of apportionment prescribed by the New York State constitution.

The opinions below do not discuss these figures, except that the opinion of Judge Levet repeats the misleading statistics about New York City which appear in his prior opinion, see opinion below, p. 4; *WMCA* v. *Simon*, 202 F. Supp. 741, 749 (S.D.N.Y.), *judgment vacated and case remanded*, 370 U. S. 190 (1962), and which were attacked in

* In making an apportionment the legislature is required to follow the rules for doing so prescribed in the state constitution. While the legislature has some discretion in drawing senate district lines for multi-county districts, it is probable that the present least populous multi-county district will not be affected.

the City's brief on the prior appeal. See Brief of Abe Stark, et al., *WMCA* v. *Simon*, No. 836, October Term, 1961, pp. 4-5.

As there pointed out, the fallacy consists in comparing the City's present representation in the Senate and Assembly, which is based on the 1950 census, with its population as determined in the 1960 census, on the basis of which its representation will be substantially reduced in both the Senate and Assembly as soon as the new apportionment is enacted.

The question whether a *per se* violation of the Equal Protection Clause is established by proof that a state's method of legislative apportionment results in a substantial impairment of the voting power of the majority in both houses of the legislature is of fundamental importance. *Baker* v. *Carr*, 369 U. S. 186 (1962), clearly implies more than that the claim of the Tennessee voters is justiciable, especially in view of this Court's subsequent actions in *Scholle* v. *Hare*, 369 U. S. 429 (1962), and *WMCA* v. *Simon*, *supra*. *Baker* v. *Carr* lays down a rule of substantive constitutional law to guide and limit the states in apportioning their legislatures. That rule, to have any substantive meaning, should treat as a *per se* violation a situation such as that existing in New York State, where the majority is substantially under-represented in both the Senate and Assembly. If the minority were allowed to justify the continuation of such a situation on any ground, the door would be open to nullify the practical significance of *Baker* v. *Carr*. Procedurally, through protracted litigation, if not substantively, the exception of justification would prove to be as broad as the rule itself. A rule which tolerates dis-

crimination in favor of the minority in both houses of a state legislature is no rule at all.

There is virtually no limit to the variety of arguments that can be advanced concerning the alleged special problems and interests of the less-populated areas and the danger of their being dominated by the population centers. The opinions below offer a number of examples:

> "Economic and social matters, extensive resources and their developments, roads, school systems, welfare and other matters emphasize the necessity of some geographic consideration in a state of the size and character of New York."
>
> (Opinion below, p. 23)

One in particular deserves comment. In his opinion Judge Levet states:

> "The six counties in which plaintiffs reside contain 56.2% of the citizen population of the State, but these counties comprise only 3.1% of the area of the State. *Bronx, Kings, New York and Queens are the smallest counties in the State.*"
>
> (Emphasis added; *id.* p. 22)

Judge Ryan's concurring opinion echoes this statistic: "If apportionment were based solely on population, this would mean that 3% of the State's area would dominate the rest of New York" (*id.* p. 27). Apart from the general invalidity of this type of reasoning, see Jurisdictional Statement, pp. 15-20, this particular conclusion is untenable. It overlooks the obvious: that at least in the case of the four named counties of New York City, one reason why each has so small an area is precisely that when the boundaries of each county were determined, the area contained within its boundaries had so large a population.

All such arguments noted in the opinions below in support of discrimination against the majority apparently were developed as a matter of judicial notice, since defendants offered no proof.

Decisions of other courts since *Baker* v. *Carr* support the conclusion that where the majority is under-represented in both houses a *per se* violation of the Equal Protection Clause exists. See *Toombs* v. *Fortson*, 205 F. Supp. 248, 257 (N.D. Ga. 1962);* *Baker* v. *Carr*, 206 F. Supp. 341, 349 (M.D. Tenn. 1962).**

The City submits that it would be incongruous, and unfair to the majority of the people of the State of New York, the most populous state in the Union, if the decision of the court below were permitted to give Constitutional sanction to the New York method of apportionment, through the failure of this Court to note probable jurisdiction of this appeal.

## The Question of Irrationality

Another question of importance presented by this appeal is whether under *Baker* v. *Carr* a method of legislative apportionment is rational simply because the discrimination against the voting power of the majority is intentional

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* "Granting the plaintiffs' petition for declaratory judgment, we determine and hold that so long as the Legislature of the state of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements."

** "We find in the context of this case that equal protection requires that * * * apportionment in at least one house shall be based, fully and in good faith, on numbers of qualified voters without regard to any other factor."

rather than accidental—the result of a discernible pattern rather than a "crazy quilt", the type of apportionment which happened to be present in *Baker* v. *Carr*. The reasons why *Baker* v. *Carr* should not be construed so narrowly are outlined in the Jurisdictional Statement at pp. 9-11. If a "crazy quilt" pattern of discrimination is invalid, *a fortiori* a purposeful and intentional plan of discrimination which accomplishes the same result, must be invalid. However, even if elements of irrationality must be found in the New York method of apportionment to invalidate it under the Equal Protection Clause, such elements exist. For example:

(a) It is irrational to continue to apply in 1962 a method of legislative apportionment devised in 1894—68 years ago—when it produces the results outlined above: a substantial impairment of the majority's voting power in both houses of the legislature. The population of New York State has increased from less than 6 million in 1894 to over 16 million in 1960. In recent years dramatic population shifts have taken place in New York State and are still taking place: large numbers of people are moving into the suburban communities surrounding the major cities; at the same time the population drift away from the rural areas is continuing. Moreover, the constitution of 1894 was adopted before the advent of many important improvements in transportation and communication.

(b) One of the two most discriminatory provisions with respect to apportionment of the Senate is irrational in that its impact is completely unpredictable, although the target originally intended is clear. The provision is the one barring an additional senator to any county which has three

senators, unless such county has a full (constitutional) ratio for each senator.* Unlike other counties, a county in this category (one which has 6% or more of the total population of the state) cannot receive an additional senator for any remainder in population which is less than a full ratio, however large this remainder may be. The intended target of this provision in 1894 was two counties only: the two heavily populated counties of New York City—Kings (Brooklyn) and New York (Manhattan). However, this group now also includes Queens and Bronx Counties in New York City, Erie County upstate and, for the first time, Nassau County, which will be added in the pending apportionment based on the 1960 census. It is impossible to determine in advance which county in the group, if any, will suffer from this provision in a particular apportionment. In the 1953 apportionment, Bronx County alone was denied an additional senator by this provision. It had an unrepresented remainder of 241,905 and consequently its four senate districts had by far the largest population per district of any in the state. Each Bronx County district had a population of about 344,545—greater than the entire population of Onondaga County (334,453), which received *two* senators.

In the pending apportionment based on the 1960 census, the blow will fall on Nassau, New York and Kings, with the result that in effect over 800,000 residents of those counties will not be counted in the apportionment of senate seats and, for example, the three senate districts of Nassau County will each have a population of about 425,267, as against the state-wide average of 284,926 per district.

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* A constitutional ratio is determined by dividing the total population by 50, the number of senators in the apportionment of 1894. N. Y. Const., Art. III, §4, par. 2.

By contrast, Monroe County will receive *the same* number of senators as Nassau, although Monroe's population of 571,029 is *less than half* that of Nassau (1,275,801).

(c) The other major discriminatory provision with respect to apportionment of the Senate is that which requires that the total number of senators must be increased to the extent that any county having three or more full-ratio senators becomes entitled to an additional senator. N. Y. Const., Art. III, §4, par. 3. This is an irrational provision, for the arithmetic result is that the comparative voting power of these counties *decreases* as their share of the state's population *increases*, and conversely, the voting power of the counties with less than 6% of the state's population *increases* as their share of the state's population *decreases*.

(d) The effect of the provision in the New York constitution requiring an automatic increase in the number of senators whenever a county having three or more full-ratio senators qualifies for an additional senator has been aggravated by the decision of the New York Court of Appeals in *Matter of Fay*, 291 N. Y. 198 (1943), upholding a senate apportionment in which no *reduction* in the total number of senators was made when a county in this category (New York) lost a senator, and consequently became entitled to a smaller number of senators than it had in the 1894 apportionment. Thus, as the population continues to shift away from the only two counties (Kings and New York) which had three full senate ratios in 1894, the senators lost to those counties remain in the total to be apportioned, and further inflate the representation of the counties which have less than 6% of the population.

(e) The apportionment of assembly seats among senatorial districts produces irrational results caused by the provision in the New York constitution which requires that:

> "In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly districts shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require."
>
> N. Y. Const., Art. III, § 5, par. 4.

In substance, the New York constitution prohibits the simple expedient of drawing assembly district lines within a county so as to create districts of equal population, without regard to the senate district lines within the county. As a result of this provision, in the 1953 apportionment the counties of Kings, New York, Queens, Erie and Onondaga contain assembly districts which vary substantially in population. In the case of Onondaga, two of its assembly districts have a population of about 83,613 each, while one assembly district has the same boundaries as one of the senate districts in Onondaga County, which gives it a population of 167,226, double that of each of the other two assembly districts and by far the most populous assembly district in the state. The population discrepancy among assembly districts in the same county averaged about 50,000 for the other counties affected by this provision in the 1953 apportionment.

In the pending apportionment based on the 1960 census, this provision results in creation of assembly districts of unequal population in seven counties—Nassau, Bronx, Erie, Queens, Kings, Monroe and Suffolk—with some assembly districts having enormous populations ranging from 142,000 to 217,000—far above the state-wide average of 108,000. Monroe and Suffolk represent the extreme oddities. Each county will have one assembly district with the same boundaries as a senate district and containing twice the population of each of the other four assembly districts—merely because 5, the number of assemblymen each will have, is not divisible by 3, the number of its senators. Suffolk's giant assembly district will have a population of 216,704, the most populous in the state, followed by Monroe's giant district (190,343). In the other counties affected by this provision, the range of population variation between assembly districts in the same county will be 34,000-60,000.

(f) A final irrational rule is contained in the provisions prescribing the method of apportioning assembly seats. Assemblymen are first apportioned one to each of the state's 61 counties (Fulton and Hamilton being treated as one), without regard to the population of the county. The balance of the assemblymen are then apportioned on the basis of population, after compliance with an arbitrary rule. See N. Y. Const., Art. III, § 5, par. 2. This rule requires that each county which has between one and one-half and two assembly ratios—an assembly ratio being the population of the state divided by 150, the number of assemblymen—shall receive two assemblymen. This rule originally was intended to benefit the 13 counties which were in this category in 1894.* It is an anachronism today.

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*3 New York State Constitutional Convention (1894), Revised Record 1900, 1031-32.

In the 1953 apportionment four counties received an extra assemblyman under this rule:

| *County* | *Population* |
|---|---|
| Broome | 181,496 |
| Niagara | 184,161 |
| Orange | 148,429 |
| Richmond | 185,032 |

By contrast, four one-assemblyman counties just failed to obtain an extra assemblyman. These four were:

| *County* | *Population* |
|---|---|
| Chautauqua | 133,159 |
| Dutchess | 131,969 |
| Rensselaer | 129,995 |
| Schenectady | 139,304 |

The award of an extra assemblyman to the first four counties and not to the other four counties is a completely arbitrary result, and irrational as well, since at the same time 26 other counties each received one assemblyman, although none of them had a population of over 55,000, and the state-wide average per district was 94,689.

In the pending apportionment based on the 1960 census, only three counties will receive the bonus of an extra assemblyman:

| *County* | *Population* |
|---|---|
| Broome | 209,598 |
| Dutchess | 171,396 |
| Orange | 179,874 |

and four one-assemblyman counties will not, although they are well above the state-wide average (108,272):

| *County* | *Population* |
|---|---|
| Chautauqua | 143,832 |
| Rensselaer | 140,933 |
| Rockland | 131,834 |
| Schenectady | 150,688 |

Yet 26 other one-assemblyman counties will have a population of less than 57,000 each.

In short, there are numerous instances of irrational rules in the New York method of apportionment, and in fact irrationality permeates the whole system. The only "rationality" which exists in the New York method of apportionment is that the total effect of these various rules is to produce a substantial discrimination against the majority and in favor of the minority—in *both* houses of the legislature and on *every* apportionment.

## CONCLUSION

**This appeal presents substantial questions under the Equal Protection Clause and should be heard.**

Respectfully submitted,

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GEORGE H. P. DWIGHT,
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October 10, 1962.